

Decision **DRAFT DECISION OF ALJ PRESTIDGE (Mailed 11/24/2004)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Spectrotel, Inc. for a Certificate of Public Convenience and Necessity to Operate as a Provider of Facilities-Based and Resold Local Exchange Service and Resold interLATA and intraLATA Interexchange Service Within the State of California.

Application 04-06-029
(Filed June 23, 2004)

**OPINION DENYING APPLICATION FOR
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY**

I. Summary

Spectrotel, Inc. (Applicant) seeks a certificate of public convenience and necessity (CPCN) under Pub. Util. Code § 1001 for authority to provide limited facilities-based and resold local exchange and interexchange telecommunications services. By this decision, we deny the application without prejudice based on four decisions of the Federal Communications Commission (FCC) that found Applicant in violation of laws that prohibit “slamming” in 2003.¹ If Applicant does not engage in additional instances of slamming or other violations of law, Applicant may reapply for a CPCN after one year from the date of this decision.

¹ “Slamming” is generally defined as an unauthorized change in a customer’s selection of a provider of telephone exchange service or toll service.

II. Background

In prior decisions we authorized the provision of competitive interexchange services by carriers meeting specified criteria. In addition, we authorized the provision of competitive local exchange service, by carriers meeting specified criteria, within the service territories of Pacific Bell Telephone Company (Pacific), Verizon California, Inc. (Verizon), SureWest Telephone Company (SureWest), previously named Roseville Telephone Company, and Citizens Telecommunications Company of California, Inc. (CTC).

Applicant, a Delaware corporation, seeks authority to provide limited facilities-based and resold local exchange services within the service territories of Pacific and Verizon and resold interexchange services as an interexchange carrier (IEC) and a competitive local exchange carrier (CLC) throughout the State of California.

Applicant's principal place of business is located at Shrewsbury, New Jersey.

A. Financial Qualifications

To be granted a CPCN, an applicant for authority to provide facilities-based and resold local exchange and/or interexchange services must demonstrate that it has a minimum of \$100,000 of cash or cash equivalent to meet the firm's start-up expenses.² An applicant must also demonstrate that it has

² The financial requirement for CLCs is contained in Decision (D.) 95-12-056, Appendix C. The financial requirement for IECs is contained in D.91-10-041.

sufficient additional resources to cover all deposits required by local exchange carriers (LECs) and/or IECs in order to provide the proposed service.³ Applicant has provided financial documentation that demonstrates that it has sufficient cash to satisfy the financial requirement plus any required deposits.

III. Technical and Managerial Qualifications - (Prior Instances of “Slamming”)

Applicants for IEC and CLC authority are required to make a reasonable showing of technical expertise in telecommunications or a related business. Applicant submitted biographical information on its management which demonstrates their technical qualifications to operate as a telecommunications provider.

The Commission may also deny a CPCN application in order to protect the public interest if the applicant fails to demonstrate that its management is qualified to operate a telecommunications provider in a manner that complies with applicable laws and adequately serves the public.⁴

The FCC found that on four separate occasions in 2003 Spectrotel engaged in the unlawful slamming of customers.⁵ In view of this history, we find that the

³ The requirement for CLC applicants to demonstrate that they have additional financial resources to meet any deposits required by underlying LECs and/or IECs is set forth in D.95-12-056, Appendix C. For NDIECs, the requirement is found in D.93-05-010.

⁴ See D.04-05-033.

⁵ See 2003 FCC LEXIS 4249 (Adopted July 25, 2003); 2003 FCC LEXIS 7015 (Adopted December 15, 2003); 2004 FCC LEXIS 1557 (Adopted March 25, 2004); 2004 FCC LEXIS 3581 (Adopted June 28, 2004). The incidents of unlawful slamming occurred on April 22, 2003, May 21, 2003, June 23, 2003 and September 16, 2003.

applicant has failed to demonstrate that its management will operate the company in a responsible and lawful manner. In supplemental filing, Spectrotel states that it has now instituted procedures to avoid future violations. We therefore deny this application without prejudice. If Spectrotel is not found to have engaged in additional instances of slamming or other violations of law for an additional 12 months commencing on the date of this decision, Spectrotel may reapply for a CPCN on or after that time.

IV. Conclusion

We conclude that application should be denied without prejudice based on Applicant's history of unlawful slamming.

V. Comments on Draft Decision

The draft decision of the administrative law judge (ALJ) in this matter was mailed to the parties in accordance with Pub. Util. code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure.

Comments were received from Applicant on December 21, 2004.

Applicant argues that the Commission should grant the application, because all four FCC decisions which found that Applicant had engaged in unlawful slamming resulted from errors by Applicant's Third Party Vendor (TPV), rather than Applicant itself. Applicant states that FCC decisions found Applicant in violation of slamming laws because the TPV had either failed to verify each service for new customers, failed to verify each phone line within the company, and in one instance, failed to receive the social security number and date of birth information for the customer from the authorizing agent of the company.

Applicant contends that neither Applicant nor the TPV engaged in any intentional or misleading conduct and that applicant has never been fined for slamming or any other telecommunications or customer-related incident.

Applicant also states that its management properly responded to the slamming complaints and has the expertise to successfully operate the company.

Applicant further argues that D.04-05-033, cited in the draft decision for the proposition that the Commission may deny an application if there is not sufficient evidence that the company's management is qualified to operate as a telecommunications provider in a manner that complies with the law and adequately serves the public, involves far more egregious facts than the situation here.

We acknowledge that the four FCC decisions which found Applicant to have engaged in slamming involved the TPV's failure to fully comply with legal requirements. The FCC decisions indicate that in three instances, the TPV failed to obtain separate customer verification for each service sold as required by law. In another case, the TPV failed to obtain required customer verification data, such as the customer's date of birth or social security number. In an additional instance, the TPV failed to obtain customer verification of each phone number to be switched to Applicant's service.

However, although Applicant may not have engaged in any intentionally wrongful or misleading conduct, Applicant is legally responsible for the actions of the TPV and for ensuring that the TPV complies with laws that prohibit slamming. We therefore decline to modify the draft decision in response to Applicant's comments. If Applicant is not found to have engaged in additional slamming or other violations of law, Applicant may reapply for a CPCN in 12 months.

VI. Categorization and Need for Hearings

In Resolution ALJ 176-3136 dated July 8, 2004, the Commission preliminarily categorized this application as ratesetting, and preliminarily

determined that hearings were not necessary. No protests have been received. The applicant has been given an opportunity to provide additional information regarding its history of slamming and its other qualifications to operate as a telecommunications provider in writing. Given these developments, a public hearing is not necessary, and it is not necessary to disturb the preliminary determinations.

VII. Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and Myra J. Prestidge is the assigned ALJ in this proceeding.

Findings of Fact

1. Notice of the application appeared in the Daily Calendar on July 9, 2004.
2. No protests have been filed.
3. A hearing is not required.
4. In prior decisions the Commission authorized competition in providing interexchange services for carriers meeting specified criteria.
5. In prior decisions the Commission authorized competition, by carriers meeting specified criteria, in providing local exchange telecommunications services within the service territories of Pacific, Verizon, SureWest and CTC.
6. Applicant has a minimum of \$100,000 of cash or cash equivalent that is reasonably liquid and readily available to meet its start-up expenses.
7. Applicant has sufficient additional cash or cash equivalent to cover any deposits that may be required by other telecommunications carriers in order to provide the proposed service.
8. The FCC has found that on four separate occasions in 2003, Applicant engaged in unlawful slamming of customers.

9. In view of its history of slamming, Applicant has failed to demonstrate the ability to operate as a telecommunications carrier in a lawful manner that appropriately serves the public.

Conclusions of Law

1. Applicant has the financial ability and technical expertise to provide the proposed service.

2. In view of Applicant's history of slamming, Applicant has not demonstrated sufficient managerial expertise to operate as a telecommunications carrier at this time.

3. In view of Applicant's history of slamming, granting the application at this time would not serve the public interest.

O R D E R

IT IS ORDERED that:

1. The application is denied without prejudice.

2. If Spectrotel, Inc. (Applicant) is not found to have engaged in additional acts of slamming or other violations of law within 12 months of the date of this decision, Applicant may reapply for a certificate of public convenience and necessity at or after that time.

3. Application 04-06-029 is closed.

This order is effective today.

Dated _____, at San Francisco, California.